IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.460 OF 1996
IN
WRIT PETITION NO.2296 OF 1992

1. The Regional Provident Fund
Commissioner, Maharashtra & Goa,
Bhavishya Nidhi Bhavan, 41,
Bandra (East), Bombay-400 051.

2. The Union of India .. Appellant
(Orig.Respdt.
Nos.2 and 1)

v/s.

1. Kishco Cutlery Limited
a public limited company
having its registered office
at Bharat Insurance Building,
2nd floor, 15A, Nariman Circle,
Bombay- 400 023.

2. Mr.H.N.Thadani,
Personnel Manager,
Kischo Cutlery Limited, having
his office at Bharat Insurance
Building, 2nd fllor, 15A,
Horniman Circle,
Bombay - 400 023. .. Respondents
(Orig.Petitioners
Nos.1 and 2)

Mr.S.M.Shah for the appellants.

CORAM : R.M. LODHA AND
J.P. DEVADHAR, JJ.

DATED : 22nd June, 2005

ORAL JUDGMENT (Per R.M.Lodha, J.)

The Regional Provident Fund Commissioner is in appeal aggrieved by the order dated 28th March, 1995 passed by the learned Single Judge in the writ petition whereby he set aside the notices/orders

dated 17.7.1990 and 24.6.1992.

2. The first respondent carries on business of manufacture of cutlery at its factory in Kandivli, Mumbai. The first respondent's establishment was registered as factory under the Factories Act. The said factory was formerly a division of private limited company known as Kumar Brothers (Pvt.) Ltd. On or about 13th March, 1994, the said cutlery manufacturing business was taken over by the company known as Kishco Cutlery Private Limited. By an agreement dated 30th October, 1975, the management of Kishco Cutlery Private Limited was taken over by the first respondent.

3. On 25.4.1980, a show-cause notice was issued to the first respondent as to why the damages envisaged under section 14B of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short, 'Act of 1952) be not recovered for delay in payment of contribution for the period from March, 1972 to February, 1976. The first respondent responded to the show-cause notice and disputed its liability in respect of the default of the previous management.

4. By order dated 9th January, 1981, the Regional Provident Fund Commissioner, Maharashtra and Goa,

Mumbai levied damages totalling Rs.1,39,496.35 towards penalty for delay in contribution for the period from March 1972 to February, 1976.

5. The present respondents challenged the order of the Regional Provident Fund Commissioner in Writ Petition No.414 of 1981. That writ petition was disposed of on 2nd November, 1984 whereby the damages levied by the Regional Provident Fund Commissioner were set aside and the matter was remanded back to the Regional Provident Fund Commissioner for fresh consideration.

6. In his order dated 2nd November, 1984, the learned Single Judge interalia held thus-

> "Section 14B confers upon the Provident Fund Commissioner and his officers the power to "recover from the employer such damages..... as it may think fit to impose." The proviso states that "before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard". Damages under Section 14B become due only after they have been assessed by the Provident Fund Commissioner or his officers. This is also the general law relating to damages. It is, therefore, not possible to accept Mr.Master's submission that the damages which the petitioner was called upon to pay by the order dated 9th February 1981 are covered by the words "other sums due from the employer under any provision of this Act."
>
> It was next contended by Mr.Srikrishna that the impugned order dated 9th February 1981 is not a speaking order which assesses

the element of loss and the element of punitive damages in the damages that it requires the petitioner to pay. He drew attention in this behalf to my judgement in Josts Engineering Limited, Bombay v. Union of India and another, 1983 M.L.J. 454, where it has been held that the speaking order that the quasi-judicial officer is obliged to pass must show the authority's application of mind to the assessment of the actual loss and of penal damages and must state what the allocation between the two heads is. The barest perusal of the impugned order supports Mr.Srikrishna's contention.

In view of the fact that I upheld the first two contention it is not necessary to decide whether the order dated 9th February 1981 should have specified, for each period, what the exact damages were.

The impugned order dated 9th February 1981 is quashed and set aside. It will be open to the 1st respondent to hold a fresh inquiry upon the notices dated 28th April 1980. The 1st respondent shall permit the petitioner a fresh opportunity to show cause in writing and at a hearing. He shall consider the points raised by the petitioner. He shall pass an order bearing in mind the provision of Section 17B and shall for such purpose determine when the transfer took place and the petitioner assumed the character of employer. He shall also bear in mind the principles laid down in the case of Josts Engineering Ltd."

7. The Regional Provident Fund Commissioner considered the matter again and by his order levied the damages to the tune of Rs.1,39,496.55 for delayed payment of contribution for the period from March 1972 to February 1976.

8. The fresh order passed by the Regional Provident Fund Commissioner on 24.6.1992 was again

challenged by the present respondents in writ petition No.2296 of 1992. By order dated 28th March, 1995, the writ petition was allowed and the impugned order of the Regional Provident Fund Commissioner passed on 24.6.1992 has been set aside. Aggrieved thereby, the Regional Provident Fund Commissioner is in appeal as already indicated by us.

9. What shocks us is the manner in which the Regional Provident Fund Commissioner considered the judgment of this court passed on 2.11.1984 in writ petition No.414 of 1981. He had audacity to record that he differed with the judgment of the jurisdictional High Court i.e., Bombay High Court dated 2.11.1984. The conduct on the part of the Regional Provident Fund Commissioner not only smacks of indiscipline but also contemptuous. Besides that, the view of the Regional Provident Commissioner is erroneous and wrong as well.

10. The Regional Provident Fund Commissioner was concerned with the defaults in payment of contribution by the establishment during the period from March 1972 to February 1976. During that period the transferor was in the management of the establishment. The issue is whether the liability

of damages imposed under section 14B could be fastened on the transferee under section 17B of the Act of 1952.

11. Section 14B enables recovery of damages from an employer making default in the payment of contribution as required in law. Section 17B provides for liability in case of transfer of establishment. It reads thus-

> "17-B. Liability in case of transfer of establishment
>
> Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence, or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or [the Family Pension Scheme or the Insurance Scheme], as the case may be, in respect of the period up to the date of such transfer:
>
> Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer]"

11. The question is whether the words "other sums due from the employer" under section 17B covers in its scope damages levied under section 14B for default in payment of contributions.

12. In the earlier writ petition No.414 of 1981,

the learned Single Judge held that the damages levied under section 14B are not covered by the words "other sums due from the employer under any provisions of this Act".

13. In Darjeeling Dooars Plantation Ltd. and anr. v. Regional P.F. Commissioner W.B. and ors., 1995(1) LLJ 939, the Division Bench of Calcutta High Court held thus-

> 14. A plain reading of Ss.14B, 15(2), 17(5) clearly indicates that the said Sections contemplate a period and or stage prior to any transfer of the establishment. Section 17B of the Act on the other hand contemplates a stage post transfer. The same will be evident from the use of the expression "the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay contribution and "other sums due from the employer". So that expression "the employer and other person to whom the establishment is transferred", clearly indicates that the transferee does not come within the meaning of the employer as in S.2(e) of the Act. Under S.17B of the Act the transferee is "the other person". So there is a distinction between "employer" and "the other person". "The other person" comes only after transfer of the establishment either in whole or in part. Transfer of the establishment is contemplated under S. 17B of the Act. The sections prior to that in the Act does not contemplate, either the transfer of the establishment or "the other person". Section 17B does not contemplate any hearing of "the employer" and "the other person" or either of them. But S. 14-B contemplates a hearing of "the employer". the absence of the expression "the other person" in S. 14-B clearly shows that it is a stage prior to the transfer of the establishment. In other words S.14B

clearly shows that it is a stage prior to the transfer of the establishment. IN other words S. 14B contemplates in its proviso notice upon "the employer", and not upon "the other persons". The three notices dated March 18, 1986 (Annexure 'B' to the petition), dated April 10, 1986 (Annexure 'C' to the writ petition) and September 3, 1986 (Annexure 'D' to the writ petition) are for the period from the month of September, 1968 to November 1968, March 1972 to January 1973 and May 1973 to February 1974. The said period is prior to the transfer of the establishment to petitioner No.1. The transfer was effected from January 1, 1975. So in view of our discussion above notice under S.14-B for the purpose of hearing of the employer is to be given upon "the employer" and not upon "the person to whom the establishment is so transferred". In the instant case the person as contemplated in S.17B of the Act is the present petitioner 1. So no notice under S.14B can be served on him. The stage of S.17B has not yet arrived. The "other sums due" has not yet been ascertained and quantified. Unless and until such sum due is ascertained and quantified which liability of the transferee shall be limited to the value of the estates obtained by him by such transfer, no demand can be raised on the transferee, in the instant case the petitioner."

14. The Division Bench of Karnataka High Court in the case of Regional Provident Fund Commissioner, Mangalore v. Karnataka Forest Plantations Corporation Limited, Bangalore, 2000-I-LLJ, 1134, considered the matter thus-

"5. In Vitro Pharma Products Company Limited v. R.P.F. Commissioner, 1986 I LLN-971 (Bom), the High Court of Judicature at Bombay has held:

"The petitioner-company, when a private limited company, and thereafter a public limited

> company, was one entity and was responsible for the defaults, being the employer within the meaning of the Act. That entity cannot avoid the liability for penalty on the footing that, at the time when the defaults took place, a management other than the current management had been in office".

In R.N.T. Estates Limited v. Union of India and others, 1989 Lab. I.C. NOC 177, Notes of Cases 176-179 Lab. I.C. 1989, while dealing with the liability in case of transfer of establishment it is held that, 'transferee of establishment becomes jointly and severally liable along with transferor to pay dues under Section 14-B by virtue of Section 17-B.

6. It is the contention of learned Counsel for the appellant that in the light of the decisions cited supra, the employer to whom the establishment is transferred shall be liable to pay the contribution and other sums due from the employer under the Act and the order passed by the learned single Judge taking contrary view in the matter has to be set aside.

7. In vitro Pharma's case, (supra), the employer company which was a private limited company was later converted into a public limited company. The Court considering this aspect held that the employer was one entity before and after its conversion into a public limited company and, therefore, was singularly responsible for the default. In that case there was no 'other employer' and the employer remained the same while only there was a change in the management. It is not so in this case where the employer at present is different from the previous employer. The facts of the present case are different from the facts of the case in Vitro Pharma (supra).

8. In R.N.T. Estates Limited's case, (supra), there was transfer of establishment under a scheme of amalgamation sanctioned by company Court. The Court held that in the event of transfer, the transferee establishment

becomes jointly and severally liable alongwith the transferor to pay the dues under Section 14-B by virtue of Section 17-B. The principle laid down in R.N.T. Estates Limited's case, (supra) does not run contrary to the interpretation of the term 'contribution and other sums due from the employer' found in Section 17-B, by the learned single Judge, in the present case. The learned single Judge was perfectly justified in holding that the concept of penalty would arise only when there is a guilt. While it can be said, on interpretation of Section 17-B, that the transferee employer is liable to pay the contribution for the period preceding the transfer, Section 17-B cannot be interpreted to mean that the transferee employer would be liable also to pay penalty for the default committed by the previous employer during the period anterior to the transfer. The penalty as correctly interpreted by the learned single Judge cannot be treated as either 'contribution' or as 'other sums due from the employer'. Such an interpretation would be opposed to the principles of natural justice. Penalty cannot be saddled on somebody who is not guilty."I

15. It seems to us that the expression "the contribution and other sums due from the employer" under section 17B refers to the ascertained and quantified amount in respect of the period upto the date of transfer. The damages under section 14B become ascertained and quantified sum on its determination. Section 17B does not envisage the imposition of liability on the transferee in case of transfer of establishment of the sum which is neither quantified nor ascertained at the time of transfer. It is not contemplated by section 17B that the transferee-employer should be made liable

to pay damages for the default committed by the transferor-employer for the period prior to the transfer. What is contemplated by section 17B is that the contributions or other sums payable under the Act or the schemes by the transferor shall be the liability of the transferee. Surely section 17B does not make the transferee liable for the unascertained and unquantified damages for the default of the erstwhile employer. That is the view of Calcutta and Karnataka High Courts. We concur with their view.

16. The learned counsel for the appellant contended that even if section 17B does not make the transferee employer liable for the damages under section 14B, in view of the agreement of transfer between the transferor and transferee, the transferee is liable. The relevant clause of the agreement upon which reliance has been placed reads thus-

> "the Vendors guarantee that there are no debts and/or liabilities of the co- other than those shown in the books of account of the said Co. as per list 'B' attached thereto and signed by the Vendors and that all the wages and other emoluments of the staff have been paid by the Co. and there are no statutory liabilities including Income Tax Sales Tax etc. of the Co. which remained unpaid upto the date of the agreement and if it is discovered at any time that there is/are any bad debts and/or any liabilities and/or unpaid wages

> or emoluments to staff the same shall be adjusted against the amount outstanding as mentioned in para 2(b) above and 7(d) below and if necessary WILL be further adjusted by the purchasers against the Loan of Rs.23 Lakhs which has been procured by the Vendors from M/s.Kishanchand & Co. as set out in the next para hereof".

17. Having considered the aforesaid clause minutely, we find that the aforesaid clause does not make the transferee liable for the damages determined under section 14B. This clause cannot be construed to cover liability in the nature of damages imposed on the transferee for the default in compliance of the provisions of the Act or the Scheme.

18. We find no error in the judgment of the learned Single Judge. The appeal is dismissed.

19. Since the respondents are not represented by their advocate, we order no costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)